IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents.*

BRIEF OF WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The slip opinion of the Circuit Court of Appeals, March 13, 1975, No. 72-2792, sought to be reviewed, is set out in Petitioners' Appendix, pages 107-128. Motions for Rehearing and for Rehearing En Banc were denied April 24, 1975 (Petitioners' Appendix, page 129).

The opinions of the trial court and Circuit Court of Appeals providing the justification for denial of this petition are those of (1) the first opinion of the Fifth

Circuit, *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (Petitioners' Appendix, pages 38-96; (2) that of Tom C. Clark, retired Justice of this Honorable Court, who sat specially as the trial judge below (whose opinion, dated February 6, 1973, is not published but appears at pages 97-106 in the Petitioners' Appendix); and (3) the Fifth Circuit Court opinion (dated March 13, 1975, not yet published but appearing at pages 107-129 in Petitioners' Appendix).

Other opinions involving some aspect of this self-same lawsuit not set out in Petitioners' petition are: *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 36 F.R.D. 107 (Judge Ingraham—S.D. Texas, 1963); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 382 S.W.2d 343 (Tex. 1964) n.r.e.

JURISDICTION

As Petitioners indicate in their petition, jurisdiction is predicated on 29 U.S.C. 1254 (1). The petition was filed on June 4, 1975, and counsel for Respondents received a copy of the same on that date.

One searches the petition herein in vain for an indication of its compliance with the considerations set out in *Supreme Court Rule 19.*

QUESTIONS PRESENTED

Stripped of the invectives, the editorializing, and the ostentatious use of adjectives by the Petitioners, the question presented by Petitioners here is whether or not they have finally had their day(s) in court as to this piece of litigation.

This case, in most of its aspects, has now been heard and reviewed by two juries (first trial, six weeks; second trial, one month); two Federal District Court Judges (Ingraham and Singleton)—one on two different occasions (Singleton); one retired Justice of this Honorable Court, sitting specially as District Judge (Tom C. Clark); two different panels of the Fifth Circuit Court of Appeals (Judges Brown, Goldberg, and Clark, first; then, Coleman, Ainsworth, and Simpson); reviewed by the entire Fifth Circuit Court of Appeals twice on motions for *en banc* hearings; by the Texas Court of Civil Appeals, 382 S.W.2d 343, and by the Texas Supreme Court, writ refused, no reversible error (Tex. 1964; holding that "Woods" had a cause of action for "Alcoa's" misuse of the Railroad Commission's processes); and there have been three other opinions of the Texas Supreme Court to which "Woods" was a party (holding that the gas produced by Woods did not involve waste and was legally produced). (Petitioners' Appendix pages 130 to 179).

This Honorable Court has twice before denied writs of certiorari in this protracted litigation—once in *Railroad Commission v. Woods Exploration & Producing Co.* (Tex. 1966), 405 S.W.2d 313 (Petitioners' Appendix, pages 130 to 163), cert. denied sub nom, *Aluminum Co. of America v. Woods Exploration, Inc.,* 385 U.S. 991 (1966), 87 S.Ct. 602, 17 L.Ed.2d 450; and, second, in *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971) (Petitioners' Appendix, pages 38 to 96), where petition from said opinion was docketed in this Court as Cause No. 1712 at the October Term, 1970, and writ of certiorari was denied by this Honorable Court in 1972 in 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed. 736 on "The facts and opinion, D.C. 284 F.Supp. 582; 304 F.Supp. 845; 438 F.2d 1286."

It is doubtful that many petitioners to this Court have had, prior to filing their petitions, such massive due process as the Petitioners here. Their real complaint is that they have not been able to prevail.

STATEMENT

Petitioners, in their "Questions Presented" and in their "Statement of the Case," overstate their case. By way of example, in "Question Presented No. 5" and "Statement of the Case," pages 5 and 8, of their Petition, the Petitioners state that they have not been permitted to develop before any jury their contention as to the drainage and confiscation by Respondents of vast quantities of Petitioners' gas. It is uncontroverted that one of Alcoa's theories at the second trial (the one involved here) was that the extraction plant was not economically feasible at the time construction was proposed because, at the time, Alcoa et al were challenging in the Texas courts the legality of the 1/3—2/3 formula and the Railroad Commission's allowing multiple completions on Woods' small town-lot wells (See Circuit Court opinion pages 122 and 123, Petitioners' Appendix).

The Petitioners again overstate their case by declaring (page 8 and elsewhere in their Petition), that "the first trial verdict was perpetually paraded by the judge and counsel alike before the jury."

For a correct factual background, Respondents respectfully refer the Court to: (1) the first opinion of the Court of Appeals, 438 F.2d 1300 (Petitioners' Appendix, 38-45 and 62-64); (2) the Memorandum Opinion of the Trial Judge on February 6, 1973 (Petitioners' Appendix pages 97-106), and (3) the second opinion of the Court of Appeals on March 13, 1975 (Pages 111-113, Petitioners' Appendix).

REASONS FOR NOT ALLOWING THE WRIT

I. **IT WAS PROPER FOR THE JURY IN THE SECOND TRIAL TO BE INFORMED OF THE OUTCOME OF THE PRIOR LITIGATION, SINCE THE ISSUE BEFORE THE JURY IN THE SECOND TRIAL PRESUMED THE EARLIER FINDINGS ON THE MONOPOLIZATION ISSUE.**
(Reply to Petitioner's Question Presented for Review #1 and Reason Number I for Allowing the Writ, Petitioner's Petition, pages 4 and 14)

II. **THE UNDERLYING PURPOSE OF RULE 54(b) WAS SERVED BY THE CONSOLIDATION OF SEPARATE APPEALS FROM THE JUDGMENT ON THE MONOPOLIZATION ISSUE AND FROM THE JUDGMENT ON THE EXTRACTION PLANT ISSUE, FOR THE PURPOSE OF ORAL ARGUMENT AND DECISION BY THE COURT OF APPEALS, WHERE THE PETITIONERS SUFFERED NO INJURY BY PARTIAL FINAL JUDGMENT UNDER RULE 42(b).**
(Reply to Petitioner's Question Presented for Review #2 and Reason Number II for Allowing the Writ, Petitioner's Petition, pages 2 and 15)

III. **ON THE SECOND TRIAL, THE COURT PROPERLY REFUSED TO RESUBMIT ANTITRUST LIABILITY TO THE JURY AND LIMITED THE TRIAL TO THE ISSUE OF DAMAGES FLOWING FROM ALCOA, ET AL'S INTERFERENCE WITH THE LIQUID EXTRACTION PLANT THROUGH THEIR CONCERNED ACTIVITY.**
(Reply to Petitioner's Question Presented for Review #3 and Reason Number II for Allowing the Writ, Petitioner's Petition, pages 5 and 15)

IV. THE TRIAL COURT PROPERLY DENIED, AT THE FIRST TRIAL, EVIDENCE OF DRAINAGE AND TEXAS SUPREME COURT DECISIONS, WHICH HELD THAT WOODS, ET AL (RESPONDENTS) PRODUCED FROM THE COMMON RESERVOIR MORE GAS THAN THAT UNDERLYING THEIR TRACTS, ON THE ISSUE OF MONOPOLIZATION; WHERE THERE WAS NO DISPUTE OVER THE FACT AND THAT ALL OF THE GAS DRAINED FROM UNDER PETITIONER'S PROPERTY WAS LEGALLY PRODUCED.

V. PETITIONERS WERE NOT DENIED THE RIGHT TO DEVELOP BEFORE ANY JURY THE CLAIMED DRAINAGE AND CONFISCATION OF VAST QUANTITIES OF PETITIONERS' GAS BY RESPONDENT.

(Reply to Petitioner's Question Presented for Review #4 and #5 and Reason Number III for Allowing the Writ, Petitioner's Petition, pages 5 and 16)

VI. THE TRIAL COURT CORRECTLY GAVE INSTRUCTION NO. 32 TO THE JURY, BECAUSE IT FOLLOWED THE HOLDING OF THE U. S. SUPREME COURT AND RELATED TO THE QUESTION OF SOUTHEASTERN'S PREPAREDNESS TO GO FORWARD WITH THE CONSTRUCTION OF THE PROPOSED EXTRACTION PLANT.

(Reply to Petitioner's Question Presented for Review #6 and Reason Number IV for Allowing the Writ, Petitioner's Petition, pages 6 and 16)

ARGUMENT

Petitioners resort to the word, "trifurcated," in a Madison-Avenue effort to mask a specious argument which has been considered and rejected by the Fifth Circuit Court twice and once by Associate Justice Clark (Retired). In fact, the same argument was presented by these Petitioners in their prior petition for certiorari filed from the first opinion of the Fifth Circuit Court of Appeals (404 U.S. 1047).

The simple fact is that the question of liability under the Act (monopolization) was tried to a jury *one* time (304 F.Supp. 845, page 847, 438 F.2d 1286, pages 1290-1291). Growing out of that monopolization, Respondents contended they had been damaged by the monopolization of the Petitioners in "drilling for, producing and transporting gas" (Question No. 2) in two respects: (1) the pipeline and (2) the extraction plant. That first jury was allowed to pass on only one phase of the damage issue—the pipeline. When the Fifth Circuit Court reversed, it simply said that the Respondents should be allowed to prove, if they could, their damages regarding the extraction-plant phase of the damages, which extraction plant had been thwarted by the concerted efforts of Petitioners.

The Trial Judge (Clark) on remand faithfully followed the instructions of the Court of Appeals on this phase of the damages and was affirmed for having done so, by the same Fifth Circuit Court, which had ordered it done.

In one form or another, these Petitioners have repeatedly urged their argument of "drainage and confiscation." Indeed, the second jury spent several days listening to this kind of evidence. It was this very evidence which prompted Justice Clark in Instruction 32 to advise the

jury that lawful acts lost their "character (as such) when they become constitutent elements of an unlawful scheme."

The only newcomer, relatively speaking, to Petitioners' stable of complaints, is as to the verdict in the first trial which retired Justice Clark read to the jury as background to explain the why of the evidence and issues in the second jury trial. Even this has been passed on by the trial judge and the Fifth Circuit panel which decided the case.

I.

IT WAS PROPER FOR THE JURY IN THE SECOND TRIAL TO BE INFORMED OF THE OUTCOME OF THE PRIOR LITIGATION, SINCE THE ISSUE BEFORE THE JURY IN THE SECOND TRIAL PRESUMED THE EARLIER FINDINGS ON THE MONOPOLIZATION ISSUE.

The Court of Appeals (page 121, Petitioners' Appendix) clearly held the above.

The Trial Court's charge to the jury on the prior verdict, was invited by Petitioners. The Trial Court's memorandum opinion reflects the course of events:

> "The Court in the first draft of the charge summarized the jury findings at the first trial concerning defendants' monopolization of the extraction of gas from Appling Field. When the defendants objected that the characterization was not full and complete, the Court then incorporated the whole verdict in the charge. The defendants then objected to the whole charge being read. The case was submitted on the theory that the monopolization charge had been established at the prior trial." (Petitioners' Appendix 104).

Petitioners again overstate their case when they say, on Page 21 of their Petition, that the verdict was admitted for all purposes. The Court instructed the prospective jurors of the very limited purpose of the prior verdict in considering the submitted issues (Circuit Court of Appeals No. 73-1633, Appendix, 565-566). The court in his charge also told the impaneled jury substantially the same thing by Instruction Number 4, only in stronger terms, as follows:

> "Except where it is stated to the contrary in this charge, you are specially instructed that the former jury verdict and the answers therein do not constitute any evidence in this trial and are not to be given any weight or consideration whatsoever by you in arriving at your answers to the issues to be submitted to you for determination. You are instructed that the matters tried in this trial were not tried or passed upon in the former trial and that the issues submitted to you for your verdict were not covered or included in the former trial or in the verdict therein. You are strictly admonished that you are to draw no favorable or unfavorable inferences from the jury verdict in the former trial or any part thereof, either in favor of or against any of the parties to this case, but are to decide the issues put to you strictly on the evidence which you have heard during this trial" (Circuit Court of Appeals No. 73-1633, Appendix, 82-83).

Absent any indication to the contrary, this Court must assume that the jury followed the court's instructions. *Lifetime Siding, Inc. v. U.S.*, 359 F.2d 657 at 661; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 at 485, 53 S.Ct. 252.

Petitioners also overstate their case on Page 21 of their petition, when they say counsel flaunted the prior jury verdict before the second jury and suggested to the second jury that it should do the same thing to Alcoa that the first jury had done. This is denied. However, Petitioners' contention that the trial judge committed reversible error by allowing Respondents' counsel to utilize the prior verdict in their jury arguments, if error at all, is foreclosed by the fact that no objection was interposed to such arguments. *Travelers Insurance Co. v. Bell,* 188 F.2d 725, 726 (5th Cir. 1951); and *Nowell v. Dick,* 413 F.2d 1204, 1212-1213 (5th Cir. 1969).

It is argued, on Page 19 of Petitioners' petition, that the submission of the verdict to the jury was improper because it was not a final, unappealable verdict, and they had in fact appealed such verdict. *International Shoe Mach. Corp. v. United Shoe Mach. Corp.,* 315 F.2d 449 (1st Cir. 1963), cert. den'd 375 U.S. 820 (1963), cited by Petitioners, is not in point. In *International Shoe,* the Court of Appeals sustained the District Court's refusal to accept in evidence the prior government judgment because of the time gap between the activities of the Defendant relied upon by the government and those relied upon by the Plaintiff. Obviously, such a distinction does not exist in the present case.

The cases cited in the footnote on Page 19 of Petitioners' Petition only state the well-established rule that, under § 5(a), the government's decree must be final before admissible in a subsequent civil action.

The portion of the prior jury's verdict to which Petitioners devote the major thrust of their complaint is Question

No. 2, wherein the jury found Petitioners, with F. E. Appling and/or others, monopolized, etc. Any contention by Petitioners that this finding is not final is foreclosed by the decision of the Court of Appeals in 438 F.2d 1286, at 1304, wherein it was held:

> "We find that Plaintiffs have satisfied the evidentiary requirements of the offense of monopolization."

and, at 1307, where it was held:

> "that the jury could find on this state of the facts that defendants possessed monopoly power in the Appling Field within the meaning of the Act."

What other finding of the prior jury can Petitioners complain of as having been improperly submitted to the second jury because not final? Petitioners cannot and would not, of course, complain of the reading to the jury of Finding No. 1, which was favorable to Petitioners.

The jury's answers to Questions 3(a) and 3(c) could not have harmed Petitioners in the instant trial in that such findings related only to Stanley C. Woods, individually, and to Woods Exploration & Producing Company; and, particularly, since the trial court below had instructed the jury in its charge that "Plaintiff Stanley C. Woods and Woods Exploration & Producing Company having introduced no evidence entitling them to have their case submitted to the jury" only as to the Plaintiff, Southeastern Pipeline Company (Instruction No. 42, Circuit Court of Appeals No. 73-1633, Appendix, 97).

Finding 3(b) was favorable to Petitioners and could have redounded only to Petitioners' benefit in the eyes of

the second jury. The same is true of Finding No. 4, that Fred A. Wolcott did not sign Exhibit No. 85-A (7-A in the second trial). In fact, the previous jury's Finding No. 4 was so favorable to Petitioners that they made almost endless attempts to relitigate the same question in the second trial.

The prior jury's Finding No. 5 that Petitioners and F. E. Appling prevented Fred Wolcott from signing Exhibit No. 85-A, was affirmed and ordered reinstated by this Court. It was made more than abundantly clear to the second jury that Southeastern relied on the oral agreement between Robert Topper on behalf of Lumar, and Woods, on behalf of Southeastern, for the construction and operation of the extraction plant. Parenthetically, 7-A was only introduced by Respondents because the trial court stated that it would grant Petitioners' request for a continuance if it were not going to be introduced by Respondents (Circuit Court of Appeals No. 73-1633, Appendix 572, 573).

Respondents submit that it is obvious that the jury in the second trial was advised of the prior jury's findings only in order to remove the void in the trial insofar as the monopolization issue was concerned.

Glen Falls Ins. Co. v. Yarborough, 396 S.W.2d 200 (Tex. Civ. App. 1965), writ ref'd n.r.e., and *Looney v. Traders & General Ins. Co.,* 231 S.W.2d 735 (Tex. Civ. App. 1950) writ ref'd n.r.e., cited by Petitioners, were state court cases and are not factually or procedurally applicable to this case.

Petitioners' real contention is that the jury should not have been informed of the prior jury verdict because Petitioners having appealed from the partial judgment, there was no final judgment; therefore, it was still, so to speak, in limbo. But not so. The jury findings as to monopolization (Question No. 2 of first verdict), the Petitioners' prevention of the use of a joint pipeline with Lumar and the option to participate in the building of a joint extraction plant (Question No. 5 of first verdict) are, in view of the U. S. Supreme Court's denial of a writ of certiorari, as between the parties, as final and binding as any judgment entered on such finding can be.

Further, the reasoning in Sec. 5(a) cases fails in the instant case simply because, if the first verdict should be overturned by the appellate court, then the verdict in the second trial would necessarily also fall. However, when the verdict in the first trial was sustained, then—to all intents and purposes— what was submitted to the second jury by the trial court's charge was, even under Petitioners' theory, a final verdict.

It is not error to acquaint a jury with a prior verdict or proceedings between the same parties. See *Beetler v. Sales Affiliates, Inc.,* 431 F.2d 651, pages 654-655, (7th Cir. 1970), *United States v. Bucon Construction Co.,* 430 F.2d 420, page 425 (5th Cir. 1970), *Gottesmann v. General Motors Corp.,* 414 F.2d 956, pages 963 to 965 (2nd Cir. 1969), cert. den'd 403 U.S. 911, *Cirillo v. Commissioner of Internal Revenue,* 314 F.2d 478, at 482 (3rd Cir. 1964); *Stagecrafters-Club, Inc. v. District of Columbia Division of American Legion,* 111 F. Supp. 127, 128-129 (D.C. 1953), followed in *United States v. Wainer,* 211 F.2d 669, 671 (7th Cir. 1954), cert. den'd 355 U.S. 815.

II.

THE UNDERLYING PURPOSE OF RULE 54(b) WAS SERVED BY THE CONSOLIDATION OF SEPARATE APPEALS FROM THE JUDGMENT ON THE MONOPOLIZATION ISSUE AND FROM THE JUDGMENT ON THE EXTRACTION PLANT ISSUE, FOR THE PURPOSE OF ORAL ARGUMENT AND DECISION BY THE COURT OF APPEALS, WHERE THE PETITIONERS SUFFERED NO INJURY BY PARTIAL FINAL JUDGMENT UNDER RULE 42(b).

In order to meet Petitioners' contention that, somehow or other, the separate trial of the second damage issue (extraction plant) had been tainted by the first jury trial and the partial judgment covering liability and one damage issue (pipeline), the Fifth Circuit Court consolidated the appeal of the Petitioners taken from the entry of the partial judgment (re: the pipeline) which had been previously argued, with their appeal taken from the judgment entered as a result of the trial of the second element of damages (extraction plant). Following such consolidation, further argument was ordered before the court. By this process, the appellate court obviously considered all aspects of Petitioners' objections and, as it said, satisfied the "underlying purpose of Rule 54(b)" (see pages 113 and 114 of Petitioners' Appendix).

28 U.S.C. Rule 42(b) clearly provides for separate trials, in the furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, of any claim, separate issue, or number of claims or issues, as follows:

> "SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

The appellate court's actions under 28 U.S.C. 2111 make the claimed error harmless. Said rule reads as follows:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

There is no possible harm to Petitioners by the court's entry of the final partial judgment. Since there can be no question but that the trial court was duty bound to reinstate the jury verdict, had the trial court in the exercise of his discretion determined not to enter a final partial judgment, what would have been the status of the case? Certainly, Respondents would have their first verdict. When the trial on the issues as to an extraction plant culminated, as it did, in a verdict for Respondents, the court would then have been duty bound to enter a judgment on both verdicts with interest running from the respective dates of the verdicts, thus reaching the same result.

On the first trial of the case and first opinion of the Court of Appeals, writ of certiorari denied, Petitioners

asserted the right to have an injunction against the prosecution of the state court case and the authority for the partial final judgment was to protect them; and the entry of the trial judge, in the second trial, benefited them as well as Respondents. The Court of Appeals in the first case (pages 84 to 94 of Petitioners' Appendix).

Contrary to the statement on Page 22 and Page 23 of Petitioners' Petition, the Circuit Court of Appeals, writ denied, in the first opinion, did not hold that Respondents' original suit was solely centered on the question of false nominations. It recognized (pages 61 and 62 of Petitioners' Appendix) that in Respondents' Original Petition, Respondents asserted other grounds for recovery besides the false nominations. Also see *Woods Exploration & Producing Company, Inc., v. Aluminum Company of America, et al,* 36 F.R.D. 107, page 112 (1963).

III.

ON THE SECOND TRIAL, THE COURT PROPERLY REFUSED TO RE-SUBMIT ANTITRUST LIABILITY TO THE JURY AND LIMITED THE TRIAL TO THE ISSUE OF DAMAGES FLOWING FROM ALCOA, ET AL'S INTERFERENCE WITH THE LIQUID EXTRACTION PLANT THROUGH THEIR CONCERTED ACTIVITY.

The Circuit Court of Appeals in the second opinion (see pages 119, 120 and 121 of Petitioners' Appendix) held that the extraction plant issue was not so wholly separated as to require the re-submission of the antitrust-liability question to the jury.

Monopolization of the production and transportation of gas from the Appling Field having been established by jury verdict the Defendants' witness Reiss, (Court of Appeals 73-1633 App. 1424), general manager of Alcoa, admitted that the prevention of or restrictions on the production and transportation of gas directly affected and/or prevented the extraction of its by-products, as follows:

> "Q. So then the direct effect of stopping production from the small, town lot owners, if you were successful, you will also be successful in stopping them from using any extraction plant? If it is curtailed, it would make it uneconomical and if it's stopped, it would make it disastrous? That is corect, isn't it?
> A. Yes, sir."

This admits that the violation of the antitrust laws caused, or at least was likely to cause, the type of loss and injury which the second jury found Petitioners, sustained (Jury's Answer to Question No. Two, second verdict, pages 1(a) and 1(b) of Petitioners' Petition for Writ).

In *Continental Ore Company v. Union Carbide and Carbon Corporation,* 370 U.S. 690, 698, 82 S.Ct. 1404, 1409 the Supreme Court held that a jury, as the trier of the facts, must be permitted to draw from circumstantial evidence (here, direct) the inference that the necessary causal relationship exists.

There can be no question that, the Court of Appeals in 438 F.2d 1286, page 1307, established Petitioners' monopolization of the production and transportation of gas in the Appling Field. The Trial Judge in the second trial of this case, was duty-bound to follow that court's decision. *Consumers Petroleum Co. v. Consumers Co.,* 176 F.2d 441, 442 (C.A. 7th Cir. 1949); *D.C. Federation of Civil Associations v. Volpe,* 459 F.2d 1231, 1267 (C.A. D.C. 1972). *White v. Murtha,* 377 F.2d 428 Pages 431, 432 (C.A. 5th Cir. 1967).

No one reading the Court's opinion in 438 F.2d 1286 can reach any other conclusion but that as to the extraction plant antitrust liability was held to have been established and need not be retried. There is a wealth of authority supporting a remand for the determination of one of several damages issues without again resubmitting the other damage issues or the issue of liability. *Thorpe v. National City Bank of Tampa,* 274 F. 200 (C.A. 5th Cir. 1921); *Mass. Bonding & Insurance Co. v. J. R. Thompson Co.,* 88 F.2d 825, 832 and 833 (8th Cir. 1937), cert. denied 301 U.S. 707; *American Alliance Insurance Company v. Brady Transfer and Storage Co.,* 101 F.2d 144, 151 (8th Cir. 1939); and *Ocean Accident & Guarantee Corp. v. Penick & Ford, Ltd.,* 101 F.2d 493, 500 (8th Cir. 1939). *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* (M.D. Pa. 1960) 185 F. Supp. 826, 828, affirmed 281 F.2d 481 (3rd Cir.) cert. denied, 364 U.S. 901, 939, 81 S.Ct. 234-237 (Nov. 21, 1960); and *LoCicero v. Humble Oil & Refining Co.,* 52 F.R.D. 28 (E.D. La. 1971); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 91 S.Ct. 1434 (1971); *Washington Gas Light Company v. Connolly,* 214 F.2d 254 (C.A. D.C. 1954); *Thompson v. Camp,* 167 F.2d 733 (C.A. 6th 1948); *May Department Stores Co. v. Bell,* 61 F.2d 830 (C.A. 8th Cir. 1932).

Forty-two years ago the Supreme Court of the United States laid down the law which permits a separate trial on unresolved issues. *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 283 U.S. 494, 51 S.Ct. 513 (1931) in which the Court said:

> "Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." (Page 515)

See also *Furr v. Herzmark,* 206 F.2d 468, 472 (C.A. D.C. 1953); *Morehead v. Poland,* 457 F.2d 694, 696 (C.A. 7th Cir. 1972); Federal Rules of Civ. Pro., Rule 42(b), Separate Trials and Rule 59(a).

IV.

THE TRIAL COURT PROPERLY DENIED, AT THE FIRST TRIAL, EVIDENCE OF DRAINAGE AND TEXAS SUPREME COURT DECISIONS, WHICH HELD THAT WOODS, ET AL (RESPONDENTS) PRODUCED FROM THE COMMON RESERVOIR MORE GAS THAN THAT UNDERLYING THEIR TRACTS, ON THE ISSUE OF MONOPOLIZATION, WHERE THERE WAS NO DISPUTE OVER THE FACT AND THAT ALL OF THE GAS DRAINED FROM UNDER PETITIONERS' PROPERTY WAS LEGALLY PRODUCED.

V.

PETITIONERS WERE NOT DENIED THE RIGHT TO DEVELOP BEFORE ANY JURY THE CLAIMED DRAINAGE AND CONFISCATION OF VAST QUANTITIES OF PETITIONERS' GAS BY RESPONDENT.

The Supreme Court early held in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940), that the Supreme Court of the United States would not interfere with the rulings of the Railroad Commission of Texas and the regulatory

statutes of Texas even though the Railroad Commission orders permitted drainage of oil and gas from under adjoining tracts, in the absence of waste. Also see *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 61 S.Ct. 343 (1941).

The Circuit Court of Appeals, in its second opinion (Petitioners' Appendix 114-116), held that the exclusion from the jury of two Texas Supreme Court decisions was proper.

The market demand opinion of the Supreme Court of Texas (Petitioners' Appendix, pages 130 to 163) is the result of an appeal from the granting of a motion for a summary judgment which required the court to assume the worst side of the case as to Woods and to assume facts most favorable for Alcoa on drainage. Further, a Petition for Writ of Certiorari was filed in the U. S. Supreme Court by Alcoa to review that state court opinion and was denied by the U. S. Supreme Court sub nom, *Aluminum Co. of America v. Woods Exploration, Inc.*, 385 U.S. 991, 87 S.Ct. 602, 17 L.Ed.(2) 450 (1955). The Court's attention is called to the fact that the Supreme Court of Texas specifically held (page 133 of Petitioners' Appendix):

> "Waste is not involved, and there is nothing in the record to suggest that any gas produced from the Appling Field has been devoted to unlawful uses."

When Woods became interested in the Appling Field, he was aware that the Railroad Commission had set the 1/3—2/3 formula; and, on that basis, Woods Exploration and its investors invested considerable sums of money to drill for the gas, always projecting the probable return

under the applicable rules existing in the field. In *Railroad Commission v. Alcoa*, 380 S.W.2d 599 (1964, Petitioners' Appendix, pages 169 to 172) the Supreme Court of Texas took cognizance of the fact that Alcoa aided in establishing this very rule, and acquiesced in it for a long time without complaint. The Texas Supreme Court held that, after such a long time, it would be inequitable to overturn the formula where operators had drilled and completed wells at great expense in reliance on such formula and where contracts had become stabilized.

The trial judge, in the second trial, on motion for new trial filed by the Petitioners, overruled their point on the introduction of evidence of drainage. (See 3[b] and [d] Petitioners' Appendix, pgs. 104-105).

VI.

THE TRIAL COURT CORRECTLY GAVE INSTRUCTION NO. 32 TO THE JURY, BECAUSE IT FOLLOWED THE HOLDING OF THE U. S. SUPREME COURT AND RELATED TO THE QUESTION OF SOUTHEASTERN'S PREPAREDNESS TO GO FORWARD WITH THE CONSTRUCTION OF THE PROPOSED EXTRACTION PLANT.

The trial court correctly gave Instruction No. 32, because it followed the holding of the U. S. Supreme Court decision in *California Motor Transport, Inc. v. Trucking Unlimited*, 44 U.S. 508 (1972); and the Court of Appeals, in its second opinion (Petitioners' Appendix 122-123) which held that the Instruction was clearly related to the question of Southeastern's preparedness to go forward with the construction of the extraction plant and to

the question of the relation of the overall monopolization finding in the first trial to the damages resulting from frustrating of the building of Respondent's extraction plant.

The trial court, in overruling Petitioners' motion for new trial, clearly set out why Instruction No. 32 was proper and supported by the evidence (3(e) page 105, Petitioners' Appendix).

Such instruction was proper because it related to Southeastern's contention of an overall and general intent on the part of Petitioners to destroy Southeastern's business or property in the Appling Field, and did no more than inform the jury that *if* the action taken by the Petitioners before the Railroad Commission and the courts was pursuant to a combination and for the purpose of harassing and deterring Southeastern, such could be considered in connection with whether or not Petitioners had an intent to frustrate and thwart construction of the extraction plant.

Nor did the court's instruction in anyway unfairly characterize the *Normanna* and *Claire Benz-Stoddard* cases, nor instruct the jury that they should conclude that these lawsuits constituted violations of the antitrust laws. In fact, the Trial Court in Instruction No. 11 told the jury that "The said Defendants, of course, had a right to take such actions." Circuit Court No. 73-1633, App. 85 and 86). This one sentence in Instruction No. 11 nullifies Petitioners' contention that Instruction No. 32 was erroneous.

Petitioners next contend that Instruction No. 32 was erroneous because in the first case Judge Singleton had determined that the Petitioners' motive for filing the law-

suits and taking action before the Railroad Commission was not illegal in that there was "probable cause" for such action. Petitioners contend these conclusions of Judge Singleton were binding on Justice Clark in the second trial as the law of the case. All the opinion of Judge Singleton in 284 F.Supp. 582 held was that the Respondents were not entitled to recover *as damages* "any loss or expense which they might have suffered as a result of any litigation identified in this opinion concerning the validity of Railroad Commission rules, regulation, or orders." (Page 595). Southeastern has made no claim in this suit to recover *as damages* any legal costs, court costs, or attorneys' fees in connection with the matters referred to in Judge Singleton's opinion. The fact that Petitioners might have probable cause to believe that the challenged Commission orders were invalid in no way immunizes them to combine and conspire in a course of conduct the purpose of which was to drive Southeastern out of business. The Court of Appeals, in reversing Judge Singleton's various actions and decisions, at no point enunciated any principles of law regarding action taken by the Petitioners before the Railroad Commission in seeking a change in orders or new orders or in the institution and prosecution of litigation. A matter not decided by an Appellate Court does not become the laws of the case. *Hartford Life Ins. Co. v. Blincoe,* 255 U.S. 129, 136 (1921) and *Mutual Life Insurance Co. of New York v. Hill,* 193 U.S. 551; *Miller's Mut. Fire Ins. Ass'n of Illinois v. Bell,* 99 F.2d 289, 292 (8th Cir. 1938). Moreover, our own Texas courts in *Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, et al,* 382 S.W. 2d 343 n.r.e., cognizant of all of the Texas decisions relied on by Petitioners as proof that it could not have monopolized the production and transportation of gas in

the Appling Field, nevertheless held that Respondents did have a cause of action under the antitrust laws for misuse of Railroad Commission procedures and the courts.

United States v. First National Bank and Trust Co. of Lexington, 263 F.Supp. 268 (E.D. Ky. 1967) cited on page 34 of Petitioners' petition is not applicable in this case. In that case there was a full trial on the merits. Not so in 284 F.Supp. 582. Petitioners also cite *Smith v. Pittsburgh Gauge and Supply Co.,* 323 F.Supp. 256 (W.D. Pa. 1971). If Petitioners had gone a step further and read the opinion of the Third Circuit Court of Appeals (464 F.2d 870 [1972]) affirming the District Court they would have discovered that the *Smith* case does not stand for the proposition for which Petitioners cite it but on the contrary supports Respondents in their contention that Judge Singleton's opinion in 284 F.Supp. 582 (1968) on these "probable cause" matters was in no way prohibitive of Justice Clark submitting Instruction No. 32 to the jury in the second trial.

D. C. Federation of Civil Assoc. v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972), cited by Petitioners, also lends no support to their contentions. There the Court of Appeals simply held that their decision on a *previous appeal of* the same case which required a remand to the District Court for hearing, when no Supreme Court review was sought, became the law of the case.

CONCLUSION

As we read Rule 19 of this Court, the only possible "consideration" there listed which could be urged as cause for the Court to exercise its "sound judicial discretion" and grant a review herein on certiorari is to be found in the last part of 1(b):

> "Where a Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

It seems to us that the Fifth Circuit Court of Appeals in its two opinions (Petitioners' Appendix 38-96 and 107-129), taking into account the memorandum opinion of retired Justice Clark (Petitioners' Appendix 97-106), amply demonstrate that this litigation has been handled, insofar as Petitioners are concerned, well within the "accepted and usual course of judicial proceedings" and well within the intent and purpose of the antitrust laws of the United States. The Petitioners certainly fail to disclose any substantive reason for prolonging this litigation beyond its present age of thirteen (13) years. Respondents respectfully urge the proposition that the opinions of the Court of Appeals at long last lay this litigation to rest on solid legal principles and recognized authorities as expressed in the decisions of this Honorable Court. It is, therefore respectfully prayed that Petitioners' Application for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the 26th day of June, 1975, on attorneys for Petitioners, pursuant to Rule 33(1) of this Court, by placing three (3) copies of the foregoing brief in opposition to Petitioners' Petition for Writ of Certiorari in the U. S. Mail, first class, postage prepaid, addressed to counsel of record for Petitioners, at his post office address of record, thus serving all parties required to be served.

LEVERT J. ABLE